

IN THE
Supreme Court of the United States

October Term, 1978.

No. 78-155.

Philadelphia Newspapers, Inc., The Associated Press, Central States Publishing, Inc., The Pennsylvania Newspaper Publishers Association, The Pennsylvania Society of Newspaper Editors, and The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, *Appellants,*

v.

The Honorable Domenic D. Jerome, Judge of the Court of Common Pleas of Delaware County, Pennsylvania

and

The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, The Pennsylvania Newspaper Publishers Association and The Pennsylvania Society of Newspaper Editors, *Appellants,*

v.

The Honorable Lawrence A. Brown, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania

and

Montgomery Publishing Company, *Appellant,*

v.

The Honorable Lawrence A. Brown, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania

and

The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, The Pennsylvania Newspaper Publishers Association, and The Pennsylvania Society of Newspaper Editors, *Appellants,*

v.

The Honorable Robert W. Honeyman, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania

and

Montgomery Publishing Company, *Appellant,*

v.

The Honorable Robert W. Honeyman, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania.

Appeal From the Judgment of the Supreme Court of Pennsylvania.

**APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO
DISMISS OR AFFIRM.**

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**APPELLANTS' BRIEF IN OPPOSITION TO MOTION
TO DISMISS OR AFFIRM.**

I. The Motion to Dismiss Should Be Denied.

This is the second Appeal of these cases. This Court previously vacated the orders of the court below and remanded for an explanation of whether those orders were based upon a rejection of Appellants' federal claims or because of the peculiarities of state procedural and remedial law. Exhibit 1 to the Jurisdictional Statement ("JS"). In response, the opinion of the Pennsylvania Supreme Court¹ explained that Appellants' petitions to that court were denied *solely* because Appellants had not shown that the denial of access to an integral portion of a criminal proceeding violated their federal constitutional rights:

"We concluded on the record as presented by petitioners² that respondents' orders, which limited access to pre-trial suppression hearings in murder cases which had received great public attention, did not deny petitioners any clear legal right. We *therefore denied* petitioners the state remedies they sought."

JS, at page 62 (emphasis supplied).

Thus, the court below made no determination that Appellants had failed to fulfill any state law procedural requirement of mandamus or prohibition. Instead, the decision to be reviewed in this Court was based entirely upon the finding that Appellants' federal constitutional claims were

1. JS, Exhibit 2.

2. Since no Pennsylvania court held a hearing to determine whether any of the petitioning criminal defendants could show facts to justify limitation on the public's right to attend the suppression hearings below, the "record" consisted only of Appellants' petitions to the Pennsylvania Supreme Court. JS, at page 36, n.4.

not established.³ See also, JS, at page 41. As discussed in Section II hereof, the decision below on the merits was itself based upon the unconstitutional and irrebuttable presumption of fact that any objecting defendant would inescapably be prejudiced irreparably by an open pre-trial suppression hearing. See JS, at pages 56, 53, 54.⁴

Accordingly, the Motion to Dismiss should be denied.

II. The Motion to Affirm Should Be Denied.

Appellants have in the Jurisdictional Statement set forth why there are substantial federal questions presented in this appeal which deserve full briefing and argument by counsel. In opposition thereto, Appellees propose summary affirmance based entirely upon a mischaracterization of the opinion of the Supreme Court of Pennsylvania.

Central to the grounds asserted for summary affirmance is the following inaccurate assertion by Appellees:

3. Appellees' Motion to Dismiss argues grounds of state law upon which the Pennsylvania Supreme Court could have ruled—but did not rule—in this case. Contrary to the implication by Appellees, the Pennsylvania Supreme Court's opinion below *nowhere* purports to determine that *in this case* (1) there was any other adequate and appropriate remedy available to Appellants, (2) Appellants were seeking performance of a discretionary act, or (3) there was any basis, other than a rejection of Appellants' federal constitutional claims, upon which that court grounded its refusal to grant the relief requested. Thus, citation in the Motion, at pages 5-6, to the decision of the court below is inaccurate in failing to show that the court below relegated to a single footnote (JS, at pages 40-41, n.11) its very generalized, unspecific summary of state procedural law.

4. For example:

"The orders here are limited to pre-trial suppression hearings, which involve materials *likely* to be prejudicial to defendants." (JS, at page 56) (emphasis supplied).

"Our Rules are designed to give defendants such as Boyle, Palmer, and Phillips, all charged with murder for crimes generating substantial public attention, the opportunity to be tried, like any other persons accused of crime, on the basis of facts presented at trial." (JS, at page 53).

"Far from holding that closure and confidentiality would be automatically imposed on pretrial proceedings on motion of the defendant, the court referred to grant or denial of such a motion as a 'discretionary act' (App. 40, n. 11)." Motion, at page 9.

As previously mentioned, however, the Pennsylvania Supreme Court held that because of the irrebuttable factual presumption of inescapable and irreparable prejudice in the absence of closure, and because of the need for a uniform rule of state-wide application, the matter is *automatically* determined in Pennsylvania courts adversely to the right of access.

The opinion below does not purport to "construe" the clear mandatory language of the rules that very court adopted. It accepts those rules at face value and applies them exactly as they are written. Moreover, the opinion does not recognize or permit any meaningful discretion of Pennsylvania trial courts once a criminal defendant has asserted his absolute right under Rule 323(f) of the Pennsylvania Rules of Criminal Procedure to have the courtroom closed to the public and the press.

In fact, the court below sustained the rules pursuant to which Appellants were denied any access to pretrial suppression hearings. Such testimonial hearings are "often the critical stage in a criminal prosecution" because the results of those hearings are, as a practical matter, frequently outcome determinative. *United States v. Cianfrani*, 573 F. 2d 835, 850 (3d Cir. 1978). Sustaining the validity of the rules challenged in this appeal, the court below wrote:

"A rule of *general application* directly meeting the problem of prejudicial disclosure is indeed an appropriate procedural device for the administration

of a state court system of criminal justice. . . . [W]e believe our Rules and these orders are the most effective means of reducing premature prejudicial disclosure." JS, at pages 59-61 (emphasis supplied).

And although no hearing to consider the facts of these cases was convened in any of the trial courts or required by Pennsylvania Supreme Court, that court ruled that the orders granting secret suppression hearings "were entered pursuant to the Pennsylvania Rules of Criminal Procedure, a set of state rules designed to administer criminal justice fairly and efficiently." This appeal properly challenges the constitutionality of secrecy orders which the Supreme Court of Pennsylvania has upheld even though entered without a hearing on the necessity or propriety of secret suppression proceedings.

Thus, the Pennsylvania Supreme Court has not "required the exercise of discretion" by trial courts (Motion, at page 10), but it has in fact precluded any meaningful discretion by the trial courts or any exercise of the public's right of access to criminal proceedings. It has done so by approving orders which may be permanent in nature,⁵ and which were entered without determination of available alternatives imposing less burden upon the constitutional rights of Appellants. See *Nebraska Press Ass'n v. Stuart*, 427 U. S. 539, 562-565, 49 L. Ed. 2d 683, 699-701, 96 S. Ct. 2791 (1976).

Neither the trial courts nor the state Supreme Court considered *voir dire*, continuances, sequestration, precau-

5. Although Appellees rely heavily on the language of the court below that "the challenged orders may have expired" (JS, at page 57; Motion, at page 11), this statement inherently admits of the opposite possibility: that the challenged orders may be permanent and *not* expire. See Pa. R. Civ. P. Rule 323(f), (g). Appellants are still denied access even to the transcripts of the proceedings in question.

tionary jury instructions, or change of venue *in the circumstances of the cases at bar*. Instead, a legislative finding of across-the-board inadequacy of alternatives was made *a priori* in the promulgation of the Rules. JS, at pages 58-60.

Although the Motion argues (at page 10) that summary affirmance is required because of "a construction of the [Pennsylvania] Rules binding on this Court," Appellees do not, however, adequately address the questions presented in the Jurisdictional Statement. One of those questions (No. 1) challenges Rules 323(f) and (g) as void on their face in violation of the First, Fifth, Sixth, and Fourteenth Amendments, and as denying Appellants their right to a hearing and a showing that actual prejudice to the constitutional right of the criminal defendant cannot be avoided by other, less obtrusive measures and that a closed suppression hearing will prevent such prejudice. The Motion is silent on all of these claims except possibly to the extent they are based upon the First Amendment. The Fifth, Sixth, and Fourteenth Amendment claims are substantial,⁶ however, and interrelated with the First Amendment claim. They should be addressed by the Court following full briefing and argument by the parties.

Similarly, the Motion does not adequately address the second question presented in the Jurisdictional Statement. That question (No. 2) challenges the Pennsylvania Rules, both on their face and as applied in this case, as impermissible prior restraints in violation of the First and Fourteenth Amendments. Irrespective of whether the court below construed the state court rules, the Motion does not address the challenge to the application of those Rules to this consolidated appeal, where legislative-type fact finding has been substituted for judicial determination of

6. See JS, at pages 13-20, and the many decisions cited therein at notes 10 and 12.

the actual facts of each criminal proceeding. Again the question presented is substantial and deserving of the plenary review by this Court.

This appeal presents issues similar but not identical to those presented in *Gannett Co., Inc. v. Hon. Daniel A. DePasquale*, No. 77-1301 (certiorari granted May 19, 1978). These cases are more extreme than *Gannett Co.*, because here access to criminal proceedings was denied solely because of the statewide rule of universal and mandatory application. The Motion to Affirm should be dismissed, and this appeal should be fully briefed and presented to the Court for plenary determination in conjunction with the *Gannett Co.* case. JS, at pages 19-20.

CONCLUSION.

For the reasons set forth above and in the Jurisdictional Statement, Appellee's Motion to Dismiss or Affirm should be denied in its entirety.

Respectfully submitted,

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